In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 965

DOLCIN CORPORATION AND VICTOR VAN DER LINDE, PETITIONERS

v.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 49–55) has not yet been reported. The opinion rendered by that court when it entered the judgment which petitioners were found to have violated (Pet. 34–46) is reported in 219 F. 2d 742, certiorari denied, 348 U. S. 981, and its opinion denying rehearing *en banc* is reported in 219 F. 2d 751.

JURISDICTION

The judgments of conviction (Pet. 63) were entered on April 8, 1957, and the petition for a writ of cer-

tiorari was filed on May 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The court below entered judgments convicting petitioners of criminal contempt by reason of their wilful violation of a judgment of that court which had affirmed and enforced an order of the Federal Trade Commission.

The question presented is whether the fact that such judgments are reviewable only by this Court constitutes in itself a ground for granting certiorari.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals * * *. * * * To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari * * *.
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> * * * * *

(g) An order of the Commission to cease and desist shall become final—

* * * * *

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; * * *.

STATEMENT

In August 1949 the Commission filed a complaint charging that petitioner Dolcin Corporation and three of its officers (including petitioner van der Linde) were violating Section 5 of the Federal Trade Commission Act (Pet. 15). In December 1952, after extensive hearings, the Commission found that the respondents in that proceeding were violating Section 5 and it entered a cease and desist order (Pet. 29–30, 33).

In July 1954 the court below affirmed this order, with a slight modification of one of its paragraphs (Pet. 43–46). The court also held that it would grant petitioner's application for leave to present newly discovered evidence to the Commission but that it would not "delay finalization of the modified order throughout the taking of the additional evidence" (Pet. 46). The court noted that the case had started nearly five years earlier, and said: "The public interest in the rapid suppression of misleading medical advertisements is obvious" (*ibid.*). The court accordingly ruled that, in exercising its power to order the taking of additional evidence "upon such terms and conditions as to the court may seem proper", it would, in granting leave to adduce additional evidence, impose

the condition that the Commission's order "become final as though this were a simple affirmance" (*ibid.*).

The judgment which the court entered provided that the Commission's order as modified by the court "be, and it is hereby, ordered enforced and the petitioners herein are hereby commanded to obey the terms thereof" (Pet. 48).

A majority of the full membership of the court below denied a petition for rehearing *en banc*. In an opinion accompanying the order, the court said that, while immediate enforcement of its judgment might cause petitioners some loss of profits, continuance of advertising which is misleading "may cause many sick persons to postpone—perhaps irretrievably—more effective treatment, and waste their hopes and funds on petitioners' product." 219 F. 2d at 752. The court concluded that "the balance of equities seems clear: the policy of the statute is served by enforcement of the order" during the period of reconsideration (*ibid.*). On April 4, 1955, this Court denied a petition for writ of certiorari (348 U. S. 981).

In April 1956 the Commission requested the court below to permit it to file a petition for prosecution of petitioners for criminal contempt of the court's judgment of July 1, 1954, and in July 1956 the court directed the filing of such a petition and served on petitioners a rule to show cause. The court subsequently heard the case on the pleadings and affidavits, together with oral argument of counsel (Pet. 51). The court found "beyond a reasonable doubt" that

each petitioner had wilfully and knowingly disseminated in interstate commerce advertisements, in the form of "radio commercials," which made representations violative of the court's judgment (Pet. 52). More than 275 such broadcasts, made within the period May 20, 1955, to December 10, 1955, are set forth in the findings (Pet. 52–54).

The court's opinion dealt with the only question about which there could be any doubt—whether it was clear to petitioners that they had to comply with the court's judgment without further action by the Commission. The court stated that the terms of its judgment "make it clear that they were to do so," and that its opinion on the requested rehearing *en banc* made the requirement of immediate compliance "explicit" (Pet. 50). The court added that any possible misunderstanding of the situation by petitioners was removed by a letter of May 17, 1955, from counsel for petitioner Dolcin to its president, and that the court based its findings of guilt upon conduct subsequent to this letter (*ibid.*).[1]

The judgments entered imposed a fine of $15,000 on the corporate petitioner and a fine of $2,500 on the individual petitioner (Pet. 63).

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[1] The letter stated in pertinent part (Pet. 50):

"* * * (T)here is nothing to settle because the courts have settled the matter for us. Therefore, we are in no position to bargain.

"The F. T. C. order, as modified by the Court, speaks for itself. There is nothing further to be done now except comply with its provisions until such time when it is amended by the Commission. * * *"

ARGUMENT

The petition (Pet. 8–9) concedes that petitioners' broadcasts violated the court's judgment and that petitioners had knowledge of the judgment. That the violation was flagrant is shown by even a cursory comparison of the prohibitions of the Commission's order as affirmed by the court (Pet. 29–30, 33, 47–48) with Dolcin's broadcasts, *e. g.*, the first of those set forth in the Appendix to the court's findings (Pet. 56). The petition likewise does not contend that the court below erroneously determined any question of law. At most, the petition suggests error in a factual determination—the wilfullness of petitioners' violation. This is plainly not a question warranting the grant of certiorari.

Petitioners' contention, variously stated, is that certiorari should be granted because the judgment below is reviewable only by this Court. This represents a plea that, when a court of appeals renders the initial judicial decision, an application for certiorari should be converted into appeal as of right. To accept this view would mean that the innumerable administrative decisions (*e. g.*, those of the National Labor Relations Board, Federal Communications Commission, and similar agencies) on which courts of appeals initially pass should be reviewed as of right in this Court. Nor is it a significant distinction that the proceeding below was one to punish for contempt. This Court's rules and practice make clear that a substantial question—plainly lacking here—is a prerequisite to the grant of certiorari regardless of the nature of the proceeding.

In view of petitioners' frequent reference to "negotiations" with the Compliance Division of the Commission with respect to compliance with the court's judgment (Pet. 2, 6–8, 11–12), we think it appropriate to state that the Compliance Division never treated compliance as a subject for negotiation. The Division's position and attitude are shown by the following from its letters to petitioners' counsel (Appendix to Petitioners' Answer to Request to File a Petition for Prosecution):

A letter of May 9, 1955, states:

> As you know, the decree of the Court of Appeals for the District of Columbia entered on April 8, 1955, which commands compliance with the Commission's order, as modified by that court, is in full force and effect. Therefore, violations of the court's decree will subject respondents to penalties for contempt.
>
> It is the intention of the Commission to determine respondents' present compliance with the decree of the court of appeals and their intentions with respect thereto. If respondents do not see fit to furnish a voluntary report of compliance at this time, a determination as to their compliance with the court's decree will be made by means of other available procedures.

A letter of June 7, 1955, states:

> The advertising material submitted with your letter of May 17 has been examined and in my opinion contains many claims violative of the decree filed by the Court of Appeals for the District of Columbia on April 8, 1955.

A letter of September 30, 1955, states:

> The respondents' report submitted by you on August 10, 1955, to show the manner of their compliance with the Court's decree in the above-captioned matter is rejected. The report clearly shows violation of the decree of the Court rather than compliance with it.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be denied.

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